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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of)

Policy and Rules Concerning the)
Interstate, Interexchange Marketplace)

Implementation of Section 254(g) of the)
Communications Act of 1934, as amended)

1998 Biennial Regulatory Review)
of Customer Premises Equipment and)
Enhanced Services Unbundling Rules in the)
Interexchange, Exchange Access and)
Local Exchange Markets)

CC Docket No. 96-61

CC Docket No. 98-183

COMMENTS OF AMERICA ONLINE, INC.

George Vradenburg, III
Bill Burrington
Jill A. Lesser
Steven N. Teplitz
AMERICA ONLINE, INC.
1101 Connecticut Avenue, N.W.
Suite 400
Washington, D.C. 20036
202/530-7878

Donna N. Lampert
Donna N. Lampert Associates, P.C.
701 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2608
202/434-7385

Counsel for America Online, Inc.

Dated: November 23, 1998

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COMMENTS OF AMERICA ONLINE, INC.

America Online, Inc. ("AOL"), by its counsel, submits these comments in response to the Further Notice of Proposed Rulemaking ("FNPRM") in the above-captioned dockets concerning the unbundling of telecommunications services from enhanced services and customer premises equipment ("CPE").^{1/} For the reasons set forth below, AOL urges the Commission to retain its unbundling policies, as they have fostered consumer choice and encouraged development of innovative products and services at affordable prices.

^{1/} In re Policy and Rules Concerning the Interstate, Interexchange Marketplace; Implementation of Section 254(g) of the Communications Act of 1934, as amended 1998; Biennial Regulatory Review of Customer Premises Equipment and Enhanced Services Unbundling Rules in the Interexchange, Exchange Access and Local Exchange Markets, Further Notice of Proposed Rulemaking, CC Docket No. 96-61, CC Docket No. 98-183, FCC No. 98-258, (rel. Oct. 9, 1998).

I. INTRODUCTION AND SUMMARY

Since 1985, AOL has been a leading provider of Internet online services, providing unique content and features as well as Internet access.^{2/} AOL's subscribers, who are primarily residential consumers, generally use dial-up modems to obtain access to AOL over the traditional, circuit-switched narrowband network. As broadband services and infrastructures are deployed, AOL expects that its members will use technologies that allow faster transmission speeds and "always on" connections.

As the FCC has repeatedly recognized, AOL and other information services providers are not transmission providers themselves, but offer services that utilize the transport services offered by others.^{3/} Thus, to offer Internet online services, AOL and other Internet service providers ("ISPs"), whether affiliated with transport providers or not, purchase transmission services as end users, just as AOL's members also use telecommunications services secured pursuant to tariffed, nondiscriminatory rates, terms and conditions. By ensuring that all enhanced (now "information") service providers can obtain underlying transport services on a nondiscriminatory basis, the FCC has helped foster competition, stimulating innovation, reducing prices, and improving the quality of services available to consumers.

Indeed, this structure has helped spawn the highly competitive ISP market that exists today. Under this existing model, which allows the acquisition of unbundled transmission

^{2/} AOL provides original entertainment, news, and electronic commerce offerings, e-mail and on-line "chat" capabilities, and access to the World Wide Web and information databases. The vast majority of members are residential consumers who use AOL for personal education, information, and entertainment.

^{3/} See In re Access Charge Reform, First Report and Order, CC Docket No. 96-262, 12 FCC Rcd 15982 (1997) (Access Charge Reform Order) at ¶¶ 344-48; In re Federal-State Joint Board on Universal Service, CC Docket No. 96-45, Report to Congress, FCC 98-67 (rel. April 10, 1997) at ¶ 106. See also MacKie-Mason, "Layering for Equity and Efficiency: A Principled Approach to Universal Service Policy," Feb. 1998, appendix to Reply Comments of America Online, Inc., In re Federal-State Joint Board on Universal Service Report to Congress, CC Docket 96-45 (filed February 6, 1998).

services by ISPs and others, demand for information services has grown steadily and the public interest benefits of such services have been broadly realized for consumers and businesses alike. Similarly, the enormous diversity and innovation that has taken place in the customer premises equipment (“CPE”) market has occurred as the FCC has acted to ensure that CPE is freely and openly available on a competitive basis. In a nutshell, the FCC’s pro-competitive, forward-looking policies have encouraged competition and consumer choice while preventing providers of facilities-based transmission services from using their control over transport facilities to disadvantage independent entities.

In examining its unbundling rules and policies, the FCC should be mindful of three fundamental goals, all of which are inherent in the mandate of the Telecommunications Act of 1996.⁴¹ First, the Commission should act to preserve and promote consumer choice for CPE and information services. Second, the FCC should ensure that its policies and rules foster the growth and development of competition for all transmission services, including both today’s dial-up narrowband technology and the emerging broadband offerings. Finally, the Commission should promote full loop-to-loop facilities-based competition, especially for residential “last mile” services.

By pursuing these goals, the FCC can promote the public interest and obviate the need for regulatory micro-management, allowing the detailed regulatory scheme imposed in the past to be phased out. Critically, policies such as the current requirement that unbundled transmission services must be offered on a fair and open basis are an integral part of such a deregulatory

⁴¹ See H.R. Conf. Rep. No. 104-458, at 113 (1996) (describing goal of Telecommunications Act of 1996 as providing “a pro-competitive, de-regulatory national policy framework” for communications).

framework. As such, the FCC should retain core requirements to ensure that transmission services remain available on an unbundled basis.

II. THE FCC SHOULD CONTINUE TO REQUIRE TELECOMMUNICATIONS SERVICE PROVIDERS TO OFFER UNBUNDLED TRANSMISSION SERVICES

A. The FCC's Current Framework Has Substantially Served the Public Interest

Today, the markets for information services and CPE are flourishing, and consumers are seeing the benefits in the form of lower prices, improved products and more diverse equipment and service offerings. A dizzying array of equipment is available to residential and business customers alike, and "intelligent" multi-function devices are proliferating, offering increased control and functionality. Indeed, the availability of innovative CPE has become an important factor in allowing information service providers to utilize fully the potential of traditional "narrowband" wireline telephony, and it will likely be critical as advanced broadband capabilities develop. For example, the rapid commercialization of 56 kbps modems for home computers has made delivery of increasingly sophisticated multimedia content practical for ISPs serving residential customers. Similarly, xDSL and cable modems will be integral to the successful deployment of the transmission services of the future.^{5/}

^{5/} Notably, Congress recognized the potentially anticompetitive effects of certain bundling arrangements when it adopted Sec. 629 of the Telecommunications Act of 1996, which is designed to guarantee the availability of set-top boxes and other equipment used for access to multichannel video programming. See 47 U.S.C. § 549; see also H.R. Rep. 104-204, at 112 (1995) ("Competition in the manufacturing and distribution of consumer devices has always led to innovation, lower prices, and higher quality. Clearly, consumers will benefit from having more choices among telecommunications subscription services arriving by various distribution sources. A competitive market in navigation devices and equipment will allow common circuitry to be built into a single box or, eventually, into televisions, video recorders, etc."); H.R. Conf. Rep. No. 104-458, at 181 (1996) ("One purpose of this section is to help ensure that consumers are not forced to purchase or lease a specific, proprietary converter box, interactive device, or other equipment from the cable system or network operator.").

Likewise, the market for information services is robustly competitive, and almost 5,000 ISPs are now operating in North America,^{6/} with services ranging from “no-frills” Internet access to original multimedia content. Significantly, this diversity of ISPs gives consumers choices not only with regard to content, but also in the selection of pricing plans, training and support, and other aspects of service.

There is no doubt that competition has driven innovation in CPE and information services, and it promises to give consumers an ever-expanding selection of options in the future. Significantly, the fact the consumers have not been required to purchase a package of specific products or services to get the one they want has directly contributed to the rich array of choices that exist today.

In its seminal Computer Inquiry proceedings, the Commission established a framework designed to encourage such competition in the information services and CPE markets by guaranteeing carriers and non-carriers the right to offer services on an equal basis.^{7/} Thus, by prohibiting common carriers from bundling CPE^{8/} and requiring facilities-based carriers to make information and telecommunications services available on an unbundled basis,^{9/} the FCC promoted consumer choice and competition. While information services may be packaged with

^{6/} See Barbara Esbin, Internet Over Cable: Defining the Future In Terms of the Past, OPP Working Paper Series No. 30, Federal Communications Commission, Office of Plans and Policy, August 1998 (“Internet Over Cable”) at 18.

^{7/} See, e.g., In re Amendment of Section 64.702 of the Commission’s Rules and Regulations, CC Docket No. 20828, Final Decision, 77 FCC 2d 384, 442 (1980) (Computer II Final Decision).

^{8/} See 47 C.F.R. § 64.702(e).

^{9/} See In re Competition in the Interexchange Marketplace, Memorandum Opinion and Order on Reconsideration, CC Docket No. 90-132, 10 FCC Rcd 4562 (1995) at ¶ 72 (citing Computer II Final Decision for proposition that discounted bundling of enhanced services with telecommunications services constitutes unreasonable discrimination under 47 U.S.C. § 202); Independent Data Communications Manufacturer’s Ass’n, Inc., Petition for Declaratory Ruling and American Telephone and Telegraph Co. Petition for Declaratory Ruling, Memorandum Opinion and Order, 10 FCC Rcd 13717, 13719 (1995).

transmission services, they must be offered separately as well, so as to preserve competitive market conditions and enhance diversity.

Significantly, in adopting the Computer II regime, the Commission observed that “[i]n general, bundling of goods and services may restrict the freedom of choice of consumers and restrains their ability to engage in product substitution.”^{10/} While ultimately competition can and should obviate the need for this structural approach, the Commission stressed that bundling “clearly creates an opportunity to engage in predatory pricing.”^{11/}

The success of the Computer II regime is obvious; the thousands of independent equipment providers and ISPs are the best evidence that the obligations pertaining to unbundled services, along with other open network access requirements, have encouraged competition. The current framework, where consumers are not required to purchase bundled goods and services simply to obtain one part of the package, has directly contributed to the rich array of options that exist today. In sum, the Computer II approach to CPE and information services bundling has produced -- and continues to produce -- its intended results.

^{10/} In re Amendment of Section 64.702 of the Commission’s Rules and Regulations, CC Docket No. 20828, Final Decision, 77 FCC 2d 384, 442 (1980) (Computer II Final Decision); See also Independent Data Communications Manufacturer’s Ass’n, Inc., Petition for Declaratory Ruling and American Telephone and Telegraph Co. Petition for Declaratory Ruling, Memorandum Opinion and Order, 10 FCC Rcd 13717, 13719 (1995).

^{11/} Computer II Final Decision at 444. Computer II Final Decision at 443 (“Bundling of equipment and service charges obviously can inhibit competition because a subscriber to the carrier’s service would not be likely to obtain equipment from a non-carrier vendor if the subscriber were required to pay for carrier equipment even if he elected not to use it.”)

B. Eliminating the Unbundling Obligations for Telecommunications Services Would Undermine Consumer Choice, Frustrate Innovation and Competition, and Increase the Risk of Anticompetitive Conduct

The Commission repeatedly has reaffirmed the need to promote the “continued competitiveness of the already robust information services market.”^{12/} The desire to ensure a fair and open marketplace for enhanced services – now designated “information services” -- prompted the FCC to establish both the Computer II structural safeguards and, more recently, the Computer III nonstructural safeguards.^{13/} The Commission’s unbundling principles are a central feature of its efforts to promote competition and ensure that abusive carrier pricing and marketing tactics do not undermine consumer choice. In fact, as the FCC has noted, these safeguards “provide the only regulatory means by which certain independent ISPs are guaranteed non-discriminatory access” to needed services.^{14/}

As the FNPRM observes, elimination of the unbundling requirements would allow carriers to insist that customers purchase a particular information service or type of CPE to obtain its telecommunications services. Theoretically, if the market for telecommunications services were fully competitive, customers could simply choose another carrier. Indeed, as AOL

^{12/} Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services, Further Notice of Proposed Rulemaking, CC Docket Nos. 98-10, 95-20, FCC 98-8, at ¶ 1 (Jan. 30, 1998) (Computer III FNPRM). See also Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 21905, 21910 at ¶ 6 (1997) (“Non-Accounting Safeguards Order”).

^{13/} See In re Amendment of Sections 64.702 of the Commission’s Rules and Regulations (Third Computer Inquiry), Report and Order, CC Docket No. 85-229, 104 FCC 2d 958 (1986) (Computer III Phase I Order); In re Computer III Remand Proceedings: Bell Operating Company Safeguards and Tier 1 Local Exchange Company Safeguards, Report and Order, CC Docket No. 90-623, 6 FCC Rcd 7571 (1991) (Computer III Remand Order). The FCC is examining whether it should extend the existing structural separation to the BOCs’ provision of intraLATA information services in light of the continuing “ability and incentive [of the BOCs] to engage in anticompetitive behavior against competing ISPs.” Computer III FNPRM at ¶ 51.

^{14/} Implementation of the Non-Accounting Safeguards of Section 271 and 272 of the Communications Act of 1934, as amended, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 21905 (1997) at ¶ 134.

has stressed elsewhere, the public interest will be best served by a framework where market forces, rather than the government, serve to advance the public interest.^{15/} As a practical matter, however, transmission markets are not fully competitive, particularly with regard to “last-mile” access to residential customers. On the contrary, these essential loop facilities remain a key bottleneck that can impede competition. Moreover, as the carriers roll out advanced services, such as DSL, new concerns are emerging involving improper use of market power and anticompetitive conduct.¹⁶

In evaluating whether the CPE and unbundling restrictions are the sort of regulatory requirements that “no longer make[] sense,” the Commission should consider the relatively light burden placed on carriers by the existing regime in comparison to alternative approaches. Elimination of unbundling guarantees and removal of safeguards against tying would likely require the Commission to monitor cost accounting to prevent cross-subsidization of unregulated CPE and enhanced services with revenue from telecommunications services subject to price regulation. The Commission would also likely be called upon to resolve detailed, complex disputes as part of enforcement cases.

By contrast, the core unbundled access framework avoids micro-management of carrier pricing decisions and imposition of other marketplace controls.^{17/} For this reason, existing

^{15/} See Comments of America Online, Inc. (filed Sept. 28, 1998) In re Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket No. 98-147, Notice of Proposed Rulemaking.

¹⁶ Today, most large incumbent LECs, and all of the BOCs, are competing in the ISP market. Complaints regarding DSL to date include allegations of discrimination against independent ISPs, preferential pricing for its affiliate, installation and service delays to unaffiliated ISPs, improper cross-marketing, preferential service treatment to affiliated ISPs, Internet “slamming,” inadequate or non-existent service standards for independent ISPs, lack of or inadequate provision of information that would allow independent ISPs to market and offer their services, and other instances of discriminatory and anticompetitive conduct.

^{17/} See In re Implementation of Section II(c) of the Cable Television Consumer Protection and Competition Act of 1992. Horizontal Ownership Limits, MM Docket No. 92-264, Memorandum Opinion and Order on Reconsideration and Further Notice of Proposed Rulemaking (rel. June 26, 1998) at ¶ 42 (“structural regulation

bundling requirements restrictions are fully consistent with the goal of minimizing regulation.^{18/}

Simply put, the Computer II regime stimulates competition and consumer choice by requiring non-discrimination and open access rather than by trying to handicap incumbent carriers with burdensome supervision as they seek to participate in new markets.

Notably, AOL has no objection to the idea of allowing CPE to be bundled with transport services in the same manner currently allowed for information services. As the FNPRM acknowledges, the existing bundling restrictions “do not prohibit carriers from offering ‘one-stop’ shopping . . . [but instead] require only that the goods or services be priced separately.”^{19/} Indeed, AOL agrees that bundled offerings may provide consumers with a convenient alternative to selecting each good and service separately, a benefit available under current policy. As long as CPE and information services are available on an unbundled and nondiscriminatory basis, customers can decide whether they prefer the convenience of a pre-selected package of CPE, ISP and transmission services to shopping for the optimal combination from competing providers.^{20/} Likewise, independent information service providers can compete for customers on a fair and equal basis by acquiring “last-mile” services on the same basis as their carrier-affiliated counterparts.

generally is more easily enforced and detected than conduct regulation Nevertheless, structural regulation imposes far fewer economic costs on the market regulatory models that use primarily price as case-specific conduct regulation as a way to mitigate strategic, anticompetitive behavior.”)

^{18/} See FNPRM at ¶ 5 (citing elimination of unnecessary regulation as among goals of proceeding).

^{19/} FNPRM at ¶ 1 n. 5.

^{20/} See, e.g., In re Bundling of Cellular Customer Premises Equipment and Cellular Service, Report and Order, CC Docket No. 91-34, 7 FCC Rcd 4028, 4032 (1992) (noting that availability of bundled offerings on unbundled and nondiscriminatory basis obviates concerns about anticompetitive pricing tactics). See, e.g., In re Craig O. McCaw and American Telephone and Telegraph Co., Order, 9 FCC Rcd 5836 (1994) at ¶ 79 (noting finding that bundled offerings pose no threat to competition in cellular and CPE markets “was predicated on our requirement that local cellular service and CPE also be separately available, i.e., on an unbundled basis, at non-discriminatory rates.”).

Significantly, providers of “last mile” transport have obvious opportunities to use anticompetitive tying arrangements, because the market for these services, particularly for residential consumers, is not yet competitive. For instance, if carriers are allowed to provide ADSL modems or information services at no extra charge to customers of the underlying last-mile transport, competing providers will likely be unable to match the offering.

In fact, proposals to allow carriers to bundle CPE and enhanced service offerings without making these goods and services available separately on a nondiscriminatory basis would virtually invite anticompetitive abuses. For example, we have already seen incumbent LECs offer free Internet access with the purchase of a second telephone line in an attempt to undermine the ability of independent ISPs to compete.^{21/} Indeed, elimination of the requirement that incumbent LECs unbundle telecommunications services is at odds with the market-opening provisions of Section 251 of the Telecommunications Act of 1996, and would effectively eliminate the core aspects of the Commission’s Computer III regime. As technology and networks evolve, and as broadband services emerge, the importance of rules and policies to promote competitive choices grows.

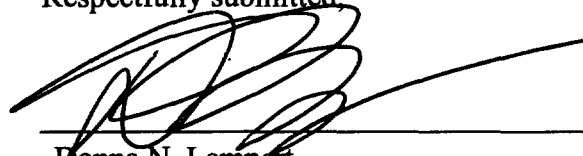
As such, the Commission should acknowledge that the principles of full and open access, which have been the pillars of its approach to deregulation of common carriers -- give consumers the freedom to choose CPE and information services based upon price and quality, and not on the choices made by “bottleneck” providers of transport services.

^{21/} See Lee L. Selwyn and Joseph W. Laszlo, “The Effect of Internet Use on the Nation’s Telephone Network,” Economics and Technology, Inc., Jan. 22, 1997, at 33, submitted as attachment to Comments of the Internet Access Coalition, CC Docket 96-262, filed January 29, 1997.

III. CONCLUSION

AOL believes that requiring the offering of unbundled transmission services remains a central part of the Commission's pro-competitive policies toward information services and advanced transport capabilities. Particularly with regard to carriers that control -- or may soon control -- "last mile" bottleneck facilities, the Commission's existing policies promote competition, innovation and consumer choice. Accordingly, the Commission should retain unbundling obligations.

Respectfully submitted,



Donna N. Lampert
Donna N. Lampert Associates, P.C.
701 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2608
202/434-7385


Counsel for America Online, Inc.

George Vradenburg, III
Bill Burrington
Jill A. Lesser
Steven N. Teplitz
AMERICA ONLINE, INC.
1101 Connecticut Avenue, N.W.
Suite 400
Washington, D.C. 20036
202/530-7878

Dated: November 23, 1998

CERTIFICATE OF SERVICE

I, Cheryl S. Flood, hereby certify that on this 23rd day of November, 1998, I caused a copy of the foregoing "Comments of America Online, Inc." to be sent by messenger (*) to the following:


Cheryl S. Flood

*Magalie Roman Salas
Secretary
Federal Communications Commission
Room 222
1919 M Street, N.W.
Washington, D.C. 20554
(original plus four copies)

*Chairman William Kennard
Federal Communications Commission
Room 814
1919 M Street, N.W.
Washington, D.C. 20554

*Commissioner Susan Ness
Federal Communications Commission
Room 832
1919 M Street, N.W.
Washington, D.C. 20554

*Commissioner Michael Powell
Federal Communications Commission
Room 844
1919 M Street, N.W.
Washington, D.C. 20554

*Commissioner Gloria Tristani
Federal Communications Commission
Room 826
1919 M Street, N.W.
Washington, D.C. 20554

*Commissioner Harold Furchtgott-Roth
Federal Communications Commission
Room 802
1919 M Street, N.W.
Washington, D.C. 20554

*Kathryn C. Brown
Chief of Staff
Office of Chairman Kennard
Federal Communications Commission
Room 814
1919 M Street, N.W.
Washington, D.C. 20554

*Carol E. Matthey
Chief
Policy and Program Planning Division
Common Carrier Bureau
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

***Robert M. Pepper**
Chief
Office of Plans and Policy
Federal Communications Commission
1919 M Street, N.W.
Room 822
Washington, D.C. 20554

***Thomas C. Power**
Legal Advisor
Office of Chairman Kennard
Federal Communications Commission
Room 814
1919 M Street, N.W.
Washington, D.C. 20554

***Kyle D. Dixon**
Legal Advisor
Office of Commissioner Powell
Federal Communications Commission
1919 M Street, N.W.
Room 844
Washington, D.C. 20554

***Kevin Martin**
Attorney Advisor
Office of
Commissioner Harold Furchtgott-Roth
Federal Communications Commission
Room 802
1919 M Street, N.W.
Washington, D.C. 20554

***Lisa Zaina**
Deputy Bureau Chief
Common Carrier Bureau
Federal Communications Commission
Room 500
1919 M Street, N.W.
Washington, D.C. 20554

***Lawrence E. Strickling**
Chief
Common Carrier Bureau
Federal Communications Commission
Room 500
1919 M Street, N.W.
Washington, D.C. 20554

***James Casserly**
Senior Legal Advisor
Office of Commissioner Ness
Federal Communications Commission
Room 832
1919 M Street, N.W.
Washington, D.C. 20554

***Paul Gallant**
Legal Advisor
Office of Commissioner Tristani
Federal Communications Commission
Room 826
1919 M Street, N.W.
Washington, D.C. 20554

Michael Pryor
Deputy Division Chief
Policy and Program Planning Division
Common Carrier Bureau
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

***Jordan Goldstein**
Legal Counsel to the Bureau Chief
Common Carrier Bureau
Federal Communications Commission
Room 500
1919 M Street, N.W.
Washington, D.C. 20554

***Janice Myles**
Policy and Program Planning Division
Common Carrier Bureau
Federal Communications Commission
Room 544
1919 M Street, N.W.
Washington, D.C. 20554
(diskette copy only)

***ITS, Inc.**
1231 20th Street, N.W.
Washington, D.C. 20037
(paper and diskette copies)